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DOLLAR TREE STORES, INC.

14 UNITED STATES DISTRICT COURT

15 NORTHERN DISTRICT OF CALIFORNIA

17 KASSONDRA BAAS and KELLY
LOFQUIST, individually and on behalf of all
18 others similarly situated,

19 Plaintiffs,

20 v.

21 DOLLAR TREE STORES, INC.,

22 Defendant.

CASE NO. C 07-03108 JSW

**DEFENDANT'S REPLY TO
PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION TO
DISMISS AND/OR STRIKE
PLAINTIFFS' COMPLAINT**

DATE: August 24, 2007

TIME: 9:00 a.m.

DEPT: Courtroom 2, 17th Flr.

JUDGE: Hon. Jeffrey S. White

COMPLAINT FILED: June 13, 2007

TRIAL DATE: No date set.

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1 **I. INTRODUCTION**

2 In its moving papers, Defendant Dollar Tree Stores, Inc. ("Dollar Tree")
 3 established that, as the target of a wide-ranging fraud allegation, it is entitled to specific
 4 information regarding the alleged scheme. In response, Plaintiffs Kassondra Baas and
 5 Kelly Lofquist ("Plaintiffs") respond by arguing—without citation—that they need not
 6 "identify all persons involved in the fraud." Opp. Br. at 5:16-17. The thrust of Dollar
 7 Tree's position, however, is that, while repeatedly arguing that the state-wide scheme
 8 was "done on a large scale and was perpetrated by high-level corporate agents" (e.g.,
 9 Opp. Br. at 14:28-15:1), Plaintiffs, short-term employees at a single store, have only
 10 identified one person. And that person, by Plaintiffs' own admission, has limited
 11 influence on a state-wide basis. Given the alleged scope of the fraud, this simply is not
 12 sufficient under Rule 9(b), which is designed to protect defendants from spurious
 13 allegations of fraudulent conduct.

14 In essence, Plaintiffs ask the Court to excuse them from compliance with
 15 the rule and permit discovery with the hope of uncovering a basis for alleging fraud. The
 16 Court should decline.

17 [I]n cases in which fraud lies at the core of the action, the rule
 18 does not permit a complainant to file suit first, and
 19 subsequently to search for a cause of action.

19 *Hayduk v. Lanna*, 775 F.2d 441, 443 (1st Cir. 1985) (collecting cases).

20 **II. ARGUMENT**

21 "Although a plaintiff may allege a unified course of fraudulent conduct and
 22 rely entirely on that course of conduct as the basis of a claim, the claim will be
 23 considered to be grounded in fraud and the pleading of that claim as a whole must
 24 satisfy Rule 9(b)." *Orlando v. Carolina Cas. Ins. Co.*, 2007 U.S. Dist. LEXIS 22672, *27
 25 (E.D. Cal. 2007). Because the Complaint here is "grounded in fraud," it must comply
 26 with Rule 9(b).

1 **A. The Complaint Should Be Dismissed Because Plaintiffs' Allegations**
 2 **Of Fraud, Which Are Incorporated Throughout The Complaint, Have**
 3 **Not Been Alleged With The Specificity Required By Rule 9(b).**

4 Nothing argued in Plaintiffs' Opposition Brief can cure the fact that their
 5 Complaint is woefully defective under Rule 9(b). Indeed, although Plaintiffs concede that
 6 they must plead the "who, what, when, where and how" of the alleged scheme (Opp. Br.
 7 at 3:22-23), it is plain they have not. Instead, Plaintiffs' Opposition Brief issues repeated
 8 assertions of law without any legal citation and fails to even discuss, much less
 9 distinguish, the primary cases cited by Dollar Tree.

10 **1. The "Who," the "How" and the "What".**

11 Plaintiffs' Complaint identifies only one person, Mr. Tellstrom. Yet nowhere
 12 do they explain how this single person could possibly have orchestrated this state-wide
 13 scheme. In fact, Plaintiffs concede the opposite is true:

14 And it is clear that high-level corporate agent Rick Tellstrom
 15 implemented the fraudulent scheme, **at least with respect to**
 16 **the many many stores he supervised.**

17 Opp. Br. at 8:26-28 (emphasis added). Dollar Tree is entitled to know the underlying
 18 facts of the alleged fraud in the California stores that Mr. Tellstrom did not supervise.
 19 And, with respect to the ten stores he did supervise (Opp. Br. at 5:22), Dollar Tree is
 20 entitled to know who else participated in this fraud, how they did so, and precisely what
 21 they did.

22 To somehow justify their omission of any supporting facts, Plaintiffs argue
 23 that they "are not required to identify all persons involved in the fraud." Opp. Br. at 5:16-
 24 17. But no authority is cited for this proposition. Nor do Plaintiffs discuss the numerous
 25 cases relied upon by Dollar Tree holding, that where the defendant is a corporation, the
 26 complaint should identify the particular agents, employees or officers accused of
 27 participating in the fraud.¹ And even assuming *arguendo* that Plaintiffs' legal assertion is

28

¹ *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007); *see also Herndon v. Scientific Applications Int'l Corp.*, 2006 U.S. Dist. LEXIS 79520 (S.D. Cal. 2006) (dismissing complaint where, *inter alia*, plaintiff did not identify the individuals who executed or negotiated the allegedly fraudulent contracts, billings, or certifications); *United States ex rel. Man Tai Lam v. Tenet*

(con't)

1 correct (it is not), surely they must be required to identify more than one person where,
 2 as here, the Complaint alleges a state-wide scheme. It simply is not possible that Mr.
 3 Tellstrom, the asserted manager of 10 stores (Opp. Br. at 5:22), could have conducted
 4 this scheme throughout California, where Plaintiffs say Dollar Tree "operates at least 200
 5 stores." Opp. Br. at 10:27.

6 Plaintiffs also ignore *United States ex rel. Brinlee v. AECOM Gov't Servs.*,
 7 2007 U.S. Dist. LEXIS 9794 *10 (W.D. La. 2007), where the Court focused on the
 8 difference between pleading the theoretical existence of a scheme and setting out
 9 specific facts showing the scheme's actual existence. It is easy to invent a scheme and
 10 then support it with conclusory statements formed on information and belief. As
 11 recognized in *AECOM* and the other cases cited by Dollar Tree, Rule 9(b) requires more.
 12 It requires facts.

13 2. The "When" and the "Where".

14 As to these questions, Plaintiffs answer that Mr. Tellstrom and his
 15 unnamed confederates perpetrated their scheme "throughout the statute of limitations
 16 period" and in the State of California. Opp. Br. at 4:26-5:1. These assertions are
 17 unhelpful. Dollar Tree cannot possibly investigate and respond to Plaintiffs' very serious
 18 charges without more information. Because Rule 9(b)'s purpose is to allow Dollar Tree
 19 to "defend against the charge and not just deny that [it has] done anything wrong,"
 20 *Swartz*, 476 F.3d at 764, Plaintiffs must be required to provide substantive factual
 21 information. At bottom, Plaintiffs cannot be allowed to assert that Dollar Tree's "high
 22 ranking corporate agents" (Opp. Br. at 1:24-26) acted illegally, and then shirk their
 23 obligation to identify the facts upon which this conclusion is supposedly based. The truth
 24 is that Plaintiffs have no such facts. Rather, as confirmed by the Complaint and the
 25
 26

27 (Continued)

28 *Healthcare Corp.*, 2006 U.S. Dist. LEXIS 95946 (W. D. Tex. 2006) (dismissing fraud claim
 against hospital where plaintiff failed to specifically identify the physicians accused of fraud).

1 Opposition Brief, their allegations of some state-wide scheme are from whole cloth. And
2 they have admitted as much. *Compl.*, ¶ 70.

3 **B. Plaintiffs' Class Action Allegations Must Be Dismissed Or Stricken**
4 **Because They Are Hopelessly Vague And Logically Impossible.**

5 Dollar Tree's Opening Brief showed there are two problems with Plaintiffs'
6 class action allegations: the alleged class cannot possibly be correct and there are no
7 facts pled establishing a class outside of Sonoma County, California. See *Compl.*, ¶¶ 1-
8 11. The alleged class cannot be correct because it is comprised of all Dollar Tree
9 employees, both exempt and non-exempt. Plaintiffs answer by saying that the
10 distinction between exempt and non-exempt has been "invented by the Defendant."
11 Opp. Br. at 9:13. Not so. This distinction is a legal one, created by federal and state
12 legislation, and made applicable to Dollar Tree through Wage Order No. 7. Plaintiffs
13 must either allege that Dollar Tree has no exempt employees in its stores (which they
14 cannot), or they must amend their class allegations to conform to the law.

15 This conclusion is supported by the class definition's failure to account for
16 distinctions between part-time and full-time employees. Plaintiffs counter that this
17 distinction is "irrelevant and meaningless" because all employees had their hours
18 shaved. Opp. Br. at 717-28. But this cannot be true unless Mr. Tellstrom and the
19 unnamed others shaved their own wages, which is illogical at best. Even on a motion to
20 dismiss, the Court need not accept as true what is economically illogical. *Hampshire*
21 *Equity Partners II, L.P. v. Teradyne, Inc.*, 2005 U.S. Dist. LEXIS 5261 (S.D.N.Y. 2005)
22 ("As a matter of law, such allegations of irrational motive cannot support a fraud claim
23 under Rule 9(b).").

24 Except to assert that their claims are "well pled," Plaintiffs do not even
25 substantively discuss Dollar Tree's remaining argument—*i.e.*, that the class definition
26 fails because it purports to include employees throughout the State of California. Here, it
27 is undisputed that (1) Plaintiffs worked at a single Dollar Tree store in Sonoma County,
28 California during a combined timeframe of October 2005 through February 2007; (2) they

1 can identify only a single person, their District Manager, Mr. Tellstrom, with oversight
 2 responsibility for only 5% of Dollar Tree's stores in California, as having participated in
 3 the alleged fraud; and (3) they concede that they presently do not have any facts
 4 regarding anyone other than Mr. Tellstrom. These facts simply do not support the state-
 5 wide class definition urged by Plaintiffs.

6 **C. Plaintiffs' Allegations Regarding The Class Action Fairness Act Must**
 7 **Be Dismissed Because The Complaint Fails To State The Statutory**
 8 **Requirements.**

9 In its moving papers, Dollar Tree asked that the Court dismiss the CAFA
 10 allegations because the Complaint fails to satisfy either its 100-person numerosity
 11 requirement or its amount in controversy requirement. See 28 U.S.C. § 1332(d)(2)(A-C).
 12 In response, Plaintiffs first say, without citation, that their claims are supported by
 13 "diversity of citizenship." Opp. Br. at 10:17-22. This statement is incorrect because,
 14 setting aside the CAFA, the Complaint does not plead that Plaintiffs individually have
 15 met the \$75,000 amount in controversy requirement under 28 U.S.C. § 1332(a).

16 Next, Plaintiffs assert, without citation, that "the Court cannot second guess
 17 the veracity of the monetary basis of its aggregate claims." Opp. Br. at 10:24-25. Again,
 18 this is not so. As discussed in its Opening Brief, the Court is not required to accept as
 19 true allegations "that are merely conclusory, unwarranted deductions of fact, or
 20 unreasonable inferences." *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir.
 21 2004). Here, because the Complaint does not identify the size of the class, Plaintiffs'
 22 naked allegation that their aggregate claims exceed the sum or value of \$5,000,000 is
 23 exactly the type of conclusory pleading the Court need not accept.

24 Finally, Plaintiffs say that it is "not strictly true" that Plaintiffs have failed to
 25 plead the numerosity requirement. Opp. Br. at 10:26. It is of course "strictly true" that
 26 the Complaint does **not** allege compliance with 28 U.S.C. § 1332(d)(5)(B)—nowhere
 27 does the Complaint say the putative class is comprised of at least 100 members.
 28 Therefore, because "the party who invokes the jurisdiction of the court has the burden of
 establishing jurisdiction," *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1216 (11th Cir.

2007), the Court need not assume the class satisfies that the CAFA's prerequisites have been established. If Plaintiffs wish to avail themselves of jurisdiction under the CAFA, then they should plead its statutory requirement.

D. Count VIII Of The Complaint, A "Request For Preliminary And Permanent Injunction And Other Equitable Relief," Should Be Dismissed Because It Is A Remedy And Not A Cause Of Action.

Plaintiffs did not submit argument on this issue and apparently concede their error. Count VIII should be dismissed with prejudice.

E. Plaintiffs' State Law Claims Must Be Dismissed Because They Cannot Simultaneously Maintain An "Opt-In" Class Under The FLSA And An "Opt-Out" Class Under Rule 23.

The class action procedures under Rule 23 are fundamentally different than the collective action procedures under the FLSA. *Leuthold v. Destination Am.*, 224 F.R.D. 462, 469-470 (N.D. Cal. 2004). Therefore the emerging trend is to disallow both types of claims in a single lawsuit. E.g., *Otto v. Pocono Health Sys.*, 457 F. Supp. 2d 522, 524 (M.D. Pa. 2006); *Neary v. Metropolitan Prop. & Cas. Ins. Co.*, 472 F. Supp. 2d 247, 248 (D. Conn. 2007). And this trend has support under Ninth Circuit law. E.g., *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859, 862 (9th Cir. 1977)². Accordingly, the Court should dismiss the state-law causes of action.³

F. The Court Should Strike Certain Allegations From The Complaint Pursuant To Rule 12(f).

1. The Court Should Strike All References To California Labor Code Section 2699 Et Seq. From The Prayer For Relief.

Plaintiffs concede that they have not complied with the exhaustion requirements set forth in the Private Attorneys General Act of 2004. Opp. Br. at 12:4-21. Therefore, the civil penalties Plaintiffs seek through § 2699 in their first and fourth

² Overruled on other grounds, *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989).

³ Nor is it true that "Defendant, in making its argument, had a choice regarding which claims to dismiss." Opp. Br. at 11:11-14. Absent CAFA jurisdiction, this Court could not retain jurisdiction over the state-law causes of action.

causes of action will not be recoverable and the Court should strike all references to § 2699 contained in the Prayer for Relief pursuant to Rule 12(f).

2. The Court Should Strike Certain Allegations From Plaintiffs' Fifth Cause Of Action For Unfair Competition.

a. The Court Should Strike References To California Labor Code Sections 203 And 226.6 Because Penalties Are Not Recoverable Under The UCL.

Plaintiffs' fifth claim for relief references California Labor Code §§ 203 and 226.6 which impose penalties upon employers who violate §§ 201 and 226(a), respectively. See *Compl.*, ¶ 56 at p. 13:22. Plaintiffs may not recover the penalties described in §§ 203 and 226.6 because they are not restitutionary and are not recoverable under the UCL. See *Tomlinson v. Indymac Bank*, 359 F. Supp. 2d 891,894-895 (C.D. Cal. 2005) (holding that penalties are not available to private litigants in a UCL action). In their Opposition Brief, Plaintiffs, citing to no authority and failing to discuss *Tomlinson*, say "[i]t is not the remedial element of those statutes that is relevant, but the standard of care elements." Opp. Br. at 13:11-12. But neither § 203 nor § 226.6 contains a standard of care. Rather, they impose penalties for violations of the standards of care articulated in the underlying statutes.

b. The Court Should Strike Plaintiffs' Request For A Temporary Restraining Order, A Preliminary Injunction And An Order To Show Cause From The UCL Prayer For Relief Because There Is No Risk Of Irreparable Harm.

On this issue, Plaintiffs offer as follows:

Nor is Defendant correct in claiming that Plaintiffs' request for injunctive relief under § 17200 is improper and must be struck. As Defendant notes, one of the remedies under § 17200 is injunctive relief. Temporary restraining orders and preliminary injunctions qualify as injunctive relief.

Opp. Br. at 13:16-19.

This assertion does not even address Dollar Tree's argument. No one disputes that temporary restraining orders and preliminary injunctions constitute injunctive relief. The point, however, is that unlike permanent injunctions, temporary restraining orders and preliminary injunctions require additional showings, which

1 Plaintiffs do not even attempt to allege. *E.g.*, *Arcamuzi v. Continental Air Lines, Inc.*, 819
2 F.2d 935, 937 (9th Cir. 1987); *Sampson v. Murray*, 415 U.S. 61, 90 (1974). Because
3 Plaintiffs' threatened injuries can be remedied through awards of actual damages and/or
4 restitution, their requests for preliminary injunctive relief, an order to show cause and for
5 a temporary restraining order are immaterial and impertinent and should be stricken from
6 the Complaint pursuant to Rule 12(f).

7 **3. The Court Should Strike Plaintiffs' Reference To IWC Wage**
8 **Order No. 9**

9 Plaintiffs agree that their citation to "Wage Order No. 9" is incorrect.
10 Plaintiffs' reference to IWC Wage Order No. 9 (*see Compl.*, p. 9:4) should be stricken on
11 the grounds that it is immaterial and impertinent to any cause of action alleged in the
12 Complaint.

13 **III. CONCLUSION**

14 The Court should dismiss the Complaint for its failure to comply with
15 Rule 9(b).

16 DATED: July 31, 2007

Respectfully submitted,

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